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82-878

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS S. KALMAR, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In this RICO case where plurality of predicate offenses was an element of the crime and where petitioner's activity could have been viewed under applicable units of prosecution law as either a single predicate offense or plural predicate offenses depending upon resolution of disputed facts, may the Court of Appeals, consistent with due process and petitioner's right to trial by jury, affirm on a factual theory not submitted to the jury and, at the same time, dismiss as harmless error the factual theory actually submitted by the trial court to the jury?

2. In this RICO case, was not Petitioner entitled, on his request, to a lesser included offense instruction under Federal Rule of Criminal Procedure 31(c) for predicate offenses as to which he satisfied the *Sansone* test?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

LOUIS S. KALMAR, SR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

Petitioner Louis S. Kalmar, Sr.* prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed his judgment of conviction entered upon a jury verdict of guilt.

---

* Pursuant to Rule 21.1(b), the appellants below were Eugene Boffa, Sr., Robert Boffa, Sr. and Chandler Lemon. Eugene Boffa, Sr. has heretofore filed a Petition For Writ Of Certiorari. Robert Boffa, Sr. and Chandler Lemon were granted new trials by the Court of Appeals.

PERTINENT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The following statutes set forth in the Appendix are pertinent:

18 U.S.C. section 1961, 1962, 1963, The Racketeer Influenced Corrupt Organization Act; 29 U.S.C. section 186, Taft-Hartley Act.

The following rule set forth in the Appendix is pertinent:

Rule 31(c) of the Federal Rules of Criminal Procedure.

The following constitutional provisions set forth in the Appendix are pertinent:

The fifth Amendment to the United States Constitution and the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Procedural History: Petitioner was convicted by a jury of RICO conspiracy (Count I) and a RICO substantive charge (Count II). Both convictions, as to this petitioner, were predicated on his commission of four misdemeanors during the four month period, July-October, 1975 within the 11 year time span, 1969 through 1980, charged in the RICO counts. Concurrent 10 year prison sentences, an aggregate fine of $20,000 and forfeiture of property valued over $250,000, were imposed as sentence. The Court of Appeals for the Third Circuit affirmed the judgment of conviction (convictions and sentences) but vacated judgment of forfeiture for further consideration by the trial court.

Concise Statement of Facts: Petitioner had been one of the principals in Universal Co-ordinators, Inc. ("UCI") a labor leasing company, since 1960 and, as here pertinent, during the entire 11 years charged in the RICO counts. The indictment alleged generally that during this 11 year period, the charged defendants, with the exception of a charged labor official, were all associated with UCI or related companies and had engaged in multiple mail fraud schemes, multiple bribery schemes and obstruction of justice.

Petitioner, however, was charged with culpable participation in only one of the many criminal episodes over the 11 years, i.e. a scheme to provide the use of a car, free of cost, to the union official in violation of the misdemeanor provisions of the Taft-Hartley Act (Kalmar was originally also charged with participation in a separate scheme to sell the same car to the official at below market price, but this charge was withdrawn by the prosecution before verdict). Petitioner's conviction is premised on his having caused UCI to furnish this automobile, a 1975 Lincoln Continental, to the union official for the latter's free use during the period July-October, 1975. The government's theory of how multiple units of prosecution might be extracted from the referenced scheme, which was espoused by the trial court in its instructions to the jury, was found by the Court of Appeals to have been "harmless error" (App. 35a) and the Court of Appeals opted for a different theory for extracting multiple units of prosecution based on inferences and conclusions that the jury could have drawn from the evidence but, it is submitted, the jury never considered because the appellate affirmance theory was not submitted to it.

Among the corporations affiliated with UCI and controlled by Petitioner and his co-Petitioner, Eugene Boffa, Sr., was an automobile leasing company called

All Purpose Leasing, Inc. ("APL"). The car was purchased specifically for Sheeran by Boffa using UCI funds but titled in APL and thereafter delivered to Sheeran for his free use, including the period July-October, 1975. It was mutually understood that Sheeran's use of the car would be free, continuous and uninterrupted during the entire time frame, as in fact it was. Unknown to Sheeran (App. 33a), the two corporations controlled by Petitioners, UCI and APL, had monthly transactions regarding the car i.e. an APL monthly lease invoice to UCI was paid each month by UCI and one document offered in evidence showed that, as between UCI and APL, UCI was the lessee of the car and APL the lessor. Later in 1975, a grand jury subpoena was served for the books and records of APL. Pursuant to the obstruction of justice charges in the indictment (Petitioner was not charged with such activity), the books and records of APL were falsified to make it appear that Sheeran had been leasing and paying for use of the car during the relevant time period, including the insertion of his name in various documents as lessee of the car. Documents showing Sheeran as the lessee were turned over to the grand jury and formed the basis for the obstruction of justice charge.

The indictment charged that for the period July-October, 1975, four separate Taft-Hartley violations had occured on the theory that Petitioners caused "UCI to deliver the free use for a month [naming July, August, September and October in separate counts] of a 1975 Lincoln Continental . . . to Francis Sheeran by paying the monthly lease payment for this vehicle to APL . . ." (App. 30a)

Following the government's consistent, repeated—and on this record, untenable—position in the lower court, the trial court responded to Petitioner's argument that a single gift of four months free use of the car had

been made by instructing the jury that the jury could find that each of UCI's monthly payments constituted a separate delivery to Sheeran of a free month's use if the jury found beyond a reasonable doubt "that UCI made monthly payments to APL in discharge of Sheeran's monthly rental obligation for the use of the automobile". (App. 35a)

In the Court of Appeals, Petitioner complained that the "discharge of monthly rental obligation" theory was simply unsupported by the record since Sheeran never had any such obligation, having received a gift of the use of the car which was a single violation of the Act.

The Court of Appeals found that the district court's jury instructions on this point (and the government's trial position) was "harmless error" and affirmed on a theory that neither party had briefed; which had never been articulated by the government; and which was never charged to the jury i.e. that UCI was the lessee of the car and its payments to APL were to acquire UCI's own interest in the car—on a month to month basis—which were constructively delivered to Sheeran on a monthly basis by permitting him free use of the car for the four month period.

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals' affirmance of this criminal conviction on the basis of a theory not presented to the jury as to the pivotal point of whether the facts as presented made out multiple Taft-Hartley violations violates due process of law and Petitioner's right to trial by jury and is so at odds with established precedent of this Court that the grant of certiorari is warranted under the standard set forth in Rule 17.1.(a) that certiorari will be granted where a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(2) In deciding that it was the intention of Congress that a predicate offense in a substantive RICO charge not be deemed a lesser included offense for purposes of requested jury instructions under Federal Rule of Criminal Procedure 31(c), notwithstanding that the predicate-RICO relationship in this case facially satisfied the *Sansone* lesser included offense instruction test, the Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

ARGUMENT

Point I

Petitioner was denied due process of law and right to trial by jury by the Court of Appeals' affirmance of his conviction on a basis not presented to the jury.

It is fundamental that theories of conviction cannot be changed on appeal and a defendant is denied due process of law if his conviction is affirmed on appeal on a theory different from that tried. In *Dunn v. United States*, 442 U.S. 100, 106-107 (1979) this Court said:

> There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. As we recognized in Cole v. Arkansas, supra., at 201, 92 L.Ed. 644, 68 S.Ct. 514, "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

Likewise, in *Chiarella v. United States*, 445 U.S. 222 (1980), the Government offered in the Supreme Court a new alternative theory to support a defendant's conviction:

> The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented

> to the jury . . . we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of §10(b). (445 U.S. at 236-37)

Mr. Justice Brennan's concurring opinion in *Chiarella* makes a similar point:

> . . . I concur in the judgment of the majority because I think it clear that the legal theory sketched by the Chief Justice is not the one presented to the jury . . . Ambiguous suggestions in the indictment and the prosecution's opening and closing remarks are no substitute for proper instructions. *And neither reference to the harmless error doctrine nor some post hoc theory of constructive stipulation can cure the defect.* The simple fact is that to affirm the conviction without an adequate instruction would be tantamount to directing a verdict of guilty, and that we plainly may not do. (445 U.S. at 239) (Emphasis added.)

Units of prosecution are a matter of statutory construction. *United States v. C.I.T. Corp.*, 344 U.S. 218 (1952). Manipulation of the units to achieve multiple offenses is prohibited. *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (barring multiple offenses by "the simple expedient of dividing a single crime into a series of temporal or spatial units"). Close questions are often presented in single offense, multiple means contexts. *United States v. Tanner*, 471 F.2d 128, 138 (7th Cir. 1972) ("line between multiple offenses and multiple means to accomplish a single continuing offense is . . . especially difficult to draw . . .")

The unit of prosecution under the Taft-Hartley Act, as here pertinent, is "deliver[y of] . . . thing of value". 29 U.S.C. §186(a). Each delivery constitutes a separate offense. *United States v. Alaimo*, 297 F.2d 604 (3d Cir.

1961), *cert. denied*, 369 U.S. 817 (1962). In this case, multiple deliveries were the key to multiple offenses. 29 U.S.C. §186(a). The deliveries to the union official must be distinguished from the deliveries between UCI and APL; the former violate the Act, the latter do only if they constitute some form of constructive delivery to the official.

RICO "pattern of racketeering activity" requires at least two acts of racketeering activity. 18 U.S.C. §1961. As here pertinent, a racketeering activity is "any act which is indictable under title 29, United States Code, section 186 . . .". 18 U.S.C. §1961.

The indictable Title 29 act pled here, and charged to the jury, was "deliver[y of.] . . . free use for a month . . . of a 1975 Lincoln Continental . . . to Francis Sheeran . . ." (App. 30a). This was said to have occurred in July; in August; in September; and in October, 1975. The means, Federal Rule of Criminal Procedure 7(c)(1), pled here [*not* the "act . . . indictable"] was "by paying the monthly lease payment for this vehicle to APL" (App. 30a). Thus, the "pattern of racketeering" was monthly delivery of free use of the car for four months; the means by which this was accomplished was through the monthly lease payments.

Since Sheeran's use of the car was free, continuous, uninterrupted and intended to have been that from the outset—a single gift of continuing use had been made—it would seem obvious that the connection between the monthly payments and Sheeran's use of the car would be essential to pyramiding this episode into four units of prosecution, particularly in RICO where plurality of predicates is an element of the crime.

What, then, was the connection between the monthly payments and Sheeran's free use? In the District Court the government consistently maintained that the payments served to discharge Sheeran's monthly rental

obligation for the car; in other words, UCI paid APL monthly to relieve Sheeran of his debt which, in turn, yielded free use, on a monthly basis, to Sheeran. The Government's theory was based on *Korhultz v. United States*, 269 F.2d 897 (10th Cir. 1959) (periodic discharges of union official's debt could be multiple deliveries of things of value to official). Petitioner responded to the *Korhultz* theory by reliance on *United States v. Lippi*, 193 F. Supp. 441, 442 (D. Del. 1961) (sham debt not subject to periodic discharge). The prosecutor argued the discharge of debt rationale on pretrial motions (A-426)*:

> . . . The defendants are charged with the free use of the automobile in question in Taft-Hartley violations. That is different from just providing a car to a union official. It charged the free use. That occurs when the car is used and when the debt is discharged, thus making it a violation each time that occurs.

In his opening speech to the jury he argued the same theory ("The cars were leased by defendant Frank Sheeran and monthly payments were made on the lease agreement . . . and the monthly payments on those leases were not made by defendant Frank Sheeran but they were made by Universal Coordinators . . .") (Trans. A-31/32); on Rule 29(a) argument the prosecutor argued the same point ("Sheeran got the free use of the car each month through a particular means and that to have Universal Coordinators discharge the debt . . . the free part of that charge occurred when Universal Coordinators discharged the debt . . . there are separate offenses when the use became free on each occasion charged in the indictment . . ."). (A-520/521)

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*"A" citations are to the Court of Appeals Appendix, which co-Petitioner Boffa certified for transmission to this Court: Rule 19.2.

After this repeated argument from the Government as to its theory of the case, and in particular that multiple offenses came from the periodic discharge of Sheeran's debt on his lease, the trial court instructed the jury:

> If you find beyond a reasonable doubt *that UCI made monthly payments to APL in discharge of Sheeran's monthly rental obligation for the use of the car*, you may find that each payment constituted a separate delivery of a thing of value (A-317) (emphasis added.)

The Court of Appeals affirmed on a theory never tried to the jury and found that the facts necessary for this newly created theory had been resolved against Petitioner.

After reciting Petitioner's position that the monthly payments were a sham to conceal the single gift of four months (and not constructive deliveries of free months of use) the Court of Appeals states:

> The Government's position is that UCI acquired its interest in the automobile only by virtue of its monthly lease payments to APL. With each lease payment, UCI acquired one month's use of the car, and it was this "thing of value," the Government contends, that it gave to Sheeran on four separate occasions. It is not our role to resolve disputed questions of fact on appeal . . . the jury could have concluded that UCI was treated by APL in the same manner as any other lessor would have been and that had UCI stopped monthly payments on the car, Sheeran's use of the car would have been terminated. (App. 33a)

But this position was never articulated in the trial court and never articulated on appeal. Moreover, the

Court's observations about not resolving "disputed questions of fact on appeal" and conclusions that the jury could have drawn, presuppose some kind of instruction on this issue. There were no instructions, save the trial court's instruction on the government's trial theory—"discharge of debt."

As to the trial court's instruction on discharge of debt, the Court of Appeals finds Petitioner's interpretation that it required the jury to conclude that Sheeran had an actual lease obligation to APL to be an "overly literal" interpretation and, even if correct, "we would regard it as harmless error" (App. 35a).

Returning to *Dunn, supra*:

> There is to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal.

It is submitted that the instant case does indeed present a glaring distinction. The case was tried on theory that UCI discharged Sheeran's debt; that theory was briefed by Petitioner; the case was affirmed on the theory that UCI acquired its own interest in the car through the payments. These theories involved different operative facts. The affirmance theory was never tried to the jury. Certiorari should be granted and the case remanded to the Court of Appeals for consideration of Petitioner's appeal in light of the actual theory submitted to the jury.

Point II

The Taft-Hartley predicates were lesser included offenses for purposes of Federal Rule of Criminal Procedure 31(c), as to which Petitioner's requested instruction should have been granted.

Count II charged a RICO substantive violation. The predicates were the referenced Taft-Hartley

monthly free use offenses. Petitioner sought a lesser included offense instruction as to predicates which were within the statute of limitations on the authority of *Sansone v. United States*, 380 U.S. 343 (1965):

> The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31(c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus '[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.'

The District Court refused a lesser included offense instruction which was affirmed by the Court of Appeals. (App. 38a)

The Court of Appeals reasoned that the Circuit Courts have consistently held that Congress intended that multiple convictions and punishments should be permitted for RICO and its predicates *e.g. United States v. Rone*, 598 F.2d 564, 571 (9th Cir.), *cert. denied*, 445 U.S. 946 (1980). The Court noted that RICO and its predicates meet the facial requirements of the *Sansone* test but concluded:

> [A] lesser included offense instruction would be inconsistent with Congress's intention to permit multiple convictions and consecutive punishment for RICO and predicate crimes . . . We believe that such an instruction is inconsistent with Congressional intent and hold that the district court properly rejected it. (App. 39a)

In compound crimes, like RICO and Continuing Criminal Enterprise, 21 U.S.C. §848, the issue of whether Congress intended cumulative punishments, does not necessarily dispose of other policies dealing with lesser included offense instructions including giving the jury the option of acquitting on the greater charge but convicting on the lesser. In *Jeffers v. United States*, 432 U.S. 137 (1977), the Court did not appear to regard it as dispositive on the question of cumulative sentencing for violations of 21 U.S.C. §846 and §848 that §846 might be a lesser included offense to §848; instead, in the context of a compound crime, the Court appeared to view these as separate concepts. Mr. Justice Blackmun's assumption that §846 might be a lesser offense, for F.R. Crim. P. 31(c) purposes, did not seem to also dispose of the cumulative sentencing issue:

> If the two charges had been tried in one proceeding, it appears that petitioner would have been entitled to a lesser included offense instruction. See Federal Rule of Criminal Procedure 31(c); *Keeble vs. United States*, 412 U.S. 205, cf. *Sansone vs. United States*, 380 U.S. 343 . . . if such an instruction had been denied on the ground of §846 was not a lesser included offense of §848, petitioner could have preserved his point by proper objection. (432 U.S. at 153-54).

Mr. Justice Blackmun then turned to the "critical inquiry" in this particular case *i.e.* whether Congress intended to punish each statutory violation separately (432 U.S. 155). See also *Whalen v. United States*, 445 U.S. 664 (1980).

Petitioner submits that *Sansone* is the proper test in RICO cases and the predicates here charged met the *Sansone* test.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2660, 81-2661, 81-2662, 81-2663, 81,2664,
81-2665 & 81-2666

UNITED STATES OF AMERICA,
Appellee,

v.

EUGENE BOFFA, SR., ROBERT BOFFA, SR.,
LOUIS S. KALMAR, SR., and CHANDLER LEMON,
Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
(D.C. Crim. Nos. 80-00036-01/03/04/05)

Argued May 25, 1982
Before: SEITZ, *Chief Judge*, SLOVITER and BECKER,
Circuit Judges
Opinion filed August 25, 1982

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OPINION OF THE COURT

SEITZ, *Chief Judge.*

Eugene Boffa, Sr., Robert Boffa, Sr., Louis Kalmar, Sr., and Chandler Lemon appeal from judgments imposing sentences of imprisonment, fines, and forfeitures entered after their convictions of racketeering offenses. 18 U.S.C. §1962(c) & (d) (1976). Eugene Boffa, Sr. and Lemon also appeal from judgments imposing sentences of imprisonment entered after their convictions of mail fraud. 18 U.S.C. §1341 (1976). This court has jurisdiction under 28 U.S.C. §1291 (1976).

I.

Appellants were tried before a jury on an eleven-count indictment, which also names as co-defendants Francis Sheeran, David Mishler, and Robert Rispo.[1] Count I charges appellants with conspiring to violate the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §1962(d). Count II alleges that appellants violated the substantive provisions of RICO, 18 U.S.C. §1962(c). Counts V through XI charge appellants Eugene Boffa, Sr. and Chandler Lemon with violating the mail fraud statute, 18 U.S.C. §1341.[2]

Before describing the factual allegations in the indictment, we will briefly outline the statutory scheme of RICO as it relates to this case. Section 1962(c) of the Act provides:

---

1. Before trial, Rispo entered a plea of guilty to Count I pursuant to a plea agreement with the Government. Mishler's case was severed from this action, and was ultimately dismissed. Sheeran was tried separately and convicted. He has filed a separate appeal.

2. Counts III and IV of the indictment relate only to defendant Sheeran and thus are not involved in this appeal.

> It shall be unlawful for any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Section 1962(d) makes it unlawful for any person to conspire to violate section 1962(c).

The term "enterprise" includes not only legal entities such as partnerships, corporations, and associations, but also any group of individuals "associated in fact." 18 U.S.C. §1961(4). Section 1961 of RICO enumerates the racketeering activities, or "predicate acts," that are necessary to establish a RICO offense. These predicate acts include violations of 18 U.S.C. §1341 (mail fraud), 29 U.S.C. §186 (Taft-Hartley Act), and 18 U.S.C. §1503 (obstruction of justice). To establish a "pattern" of racketeering activity, the Government must prove that at least two of these acts occurred within a ten-year period. 18 U.S.C. §1961(5).

The indictment in this case is a complex document. It alleges sixty-two racketeering acts based on violations of three federal statutes, involving different combinations of appellants who were engaged in various transactions. The common strand running through the indictment is appellants' association with the enterprise, comprising "a group of individuals associated in fact for the purpose of making money and obtaining other financial benefits through the business of labor leasing and motor vehicle leasing." The enterprise was operated through nine separate corporations engaged in the labor leasing business and one corporation in the business of leasing motor vehicles. The indictment alleges that Eugene Boffa, Sr., along with one or more of the other appellants, "would

control and participate in the operation" of all ten corporations.

The predicate acts alleged in the indictment include violations of the mail fraud statute, the Taft-Hartley Act, and 18 U.S.C. §1503 (obstruction of justice). We will summarize the factual allegations contained in the indictment as they relate to each predicate offense.

A. *Mail Fraud*

The indictment charges Eugene Boffa, Sr. and Chandler Lemon with ten violations of the mail fraud statute in connection with a "labor switch" at the Inland Container Corporation's facility at Newark, Delaware. In essence, the indictment alleges that appellants switched the labor leasing contracts at Inland from one corporation they controlled to another that was ostensibly independent, but which in fact they also controlled. By providing benefits to the official of the union that represented employees of the first corporation, the enterprise obtained his cooperation in the scheme. The indictment alleges that, as a result of the switch, employees were deprived of 1) the loyal, faithful, and honest services of the union official; 2) economic benefits they enjoyed through rights guaranteed them by the National Labor Relations Act (NLRA), 29 U.S.C. §157; and 3) economic benefits they enjoyed through rights they had under an existing collective bargaining agreement.

The indictment describes the scheme in some detail. Between 1971 and 1977, Universal Coordinators, Inc. (UCI), a New Jersey Corporation controlled by Eugene Boffa, Sr. leased truck drivers to Inland's Newark facility. These drivers were represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) Local 326, headed

by co-defendant Francis Sheeran. Concerned about recurring labor disputes at the Inland plant, appellant Eugene Boffa, Sr. and Sheeran agreed that after the election of officers of Local 326 in November, 1976, Boffa would terminate the leasing contract between UCI and Inland and substitute for UCI a second leasing company controlled by the enterprise. The purpose of the switch was to "cause the employees of UCI . . . to be fired and not rehired by the second leasing company."

In furtherance of this scheme, Eugene Boffa, Sr. and Chandler Lemon incorporated Preferred Personnel of Miami, Florida, and Boffa terminated UCI's leasing contract with Inland. Shortly thereafter, Lemon contacted Inland on behalf of Preferred Personnel, and offered to provide drivers following the expiration of the UCI contract. Lemon stated that neither he nor the company were in any way associated with Eugene Boffa, Sr. or UCI. He offered to provide drivers represented by the Brotherhood of Railway and Airline Clerks, who he claimed would demand substantially lower wages and fringe benefits than the Teamsters. After Inland accepted Lemon's offer, Preferred Personnel supplied an entirely new group of drivers, and the UCI employees who had been working at Inland lost their jobs. The mails were used to effectuate the scheme when appellants caused termination notices to be sent to UCI drivers. The Inland Container labor switch also formed the basis for Counts V through XI of the indictment, which allege substantive violations of the mail fraud statute.

The indictment charges appellant Robert Boffa, Sr. with nine mail fraud violations in connection with a similar labor switch at the Van Wert, Ohio facility of Continental Can Corporation. From at least 1967 until 1975, UCI leased truck drivers, who were represented by Teamsters Local 908, to Continental Can. In 1975, Con-

tinental Can expressed dissatisfaction with the service provided by UCI, and UCI agreed to provide better service if its fees were increased by 25%. When Continental Can refused, Robert Boffa, Sr., acting through UCI, decided to terminate the contract and provide drivers to Continental through Country Wide Personnel of Chicago (CWP), which he controlled as well. The alleged purpose of this switch was to enable CWP to obtain higher fees from Continental Can than had been paid to UCI, while paying less to Teamsters Local 908 drivers.

Robert Boffa, Sr. directed co-defendants Mishler and Rispo to meet with the drivers at the Continental Plant and inform them that they would be losing their jobs with UCI because of the contract termination. On behalf of CWP, Mishler and Rispo offered to hire the UCI drivers, but at lower wage rates. Both men denied that there was any relationship between CWP and UCI. The scheme was completed when UCI sent termination notices to each of the drivers. After CWP had negotiated a contract with Continental Can, the former UCI employees, now employed by CWP, continued to work at the Van Wert, Ohio facility, but at lower wage and mileage rates than they had been paid by UCI. The mailing of the termination notices in furtherance of the scheme formed the basis for the mail fraud allegations. As a result of this scheme, the indictment alleges that UCI employees at Continental Can were deprived of 1) economic benefits they enjoyed through rights guaranteed by the NLRA; and 2) economic benefits they enjoyed under the collective bargaining agreement between UCI and Local 908.

B. *Taft-Hartley*

The indictment alleges that on four occasions. Eugene Boffa, Sr. and appellant Louis Kalmar, Sr., co-owners of

UCI, "did cause UCI to deliver the free use for a month . . . of a 1975 Lincoln Continental . . . to Francis Sheeran . . . with intent to influence [Sheeran] in respect to his actions and duties as president of [Teamsters] Local 326, all in violation of [29 U.S.C. §186(a)(4) & (d)]." Further, the indictment charges that Boffa and Kalmar, through All Purpose Leasing Inc., agreed to sell Sheeran the automobile at a price below its market value, also in an attempt to influence Sheeran in violation of §186(a)(4) & (d).

C. *Obstruction of Justice*

The indictment charges that Eugene Boffa, Sr. knowingly turned over false and fictitious records of All Purpose Leasing, Inc. (APL) to the grand jury investigating the automobile transactions between APL and Sheeran, in violation of 18 U.S.C. §1503.

D. *The Jury Verdict*

The jury, which recorded its findings as to each predicate act on a summary verdict sheet, convicted all four appellants of the conspiracy and substantive RICO counts. Eugene Boffa's RICO convictions were based on the following predicate acts: ten mail fraud violations in connection with the labor switch at Inland Container, five Taft-Hartley violations arising out of the lease and sale arrangement with Sheeran, and one violation of 18 U.S.C. §1503. Chandler Lemon's RICO convictions were based on ten mail fraud violations, also in connection with the Inland switch. Five mail fraud violations in connection with the labor switch at Continental Can supported Robert Boffa's RICO convictions, and four Taft-Hartley violations in connection with the automobile lease arrangement with Sheeran supported Louis Kalmar's RICO convictions. The jury found that appellants owned at least part of the various corporations

listed in the indictment, and thus that these interests were subject to forfeiture pursuant to 18 U.S.C. §1963(a). After the jury verdict, the district court sentenced appellants to terms of imprisonment ranging from eight to 20 years, imposed fines of up to $47,000, and ordered that appellants forefeit to the United States their interests in the corporations associated with the enterprise.[3]

II.

Appellants Eugene Boffa, Sr., Robert Boffa, Sr., and Chandler Lemon contend that the labor switches at the Inland Container and Continental Can plants were, at most, unfair labor practices prohibited by section 8 of the NLRA, 29 U.S.C. §158 (1976), and therefore not properly the subject of a mail fraud prosecution. In essence, they assert that the "schemes to defraud" alleged in the indictment simply do not constitute crimes under 18 U.S.C. §1341.

We begin with the mail fraud statute, which provides criminal penalties for devising "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §1341. Since the Supreme Court recognized that a "scheme or artifice to defraud" is not limited to the common law of fraud and false pretenses, *Durland v. United States*, 161 U.S. 306, 313-14 (1896), courts have struggled to define the contours of the mail fraud statute. Generally, it has been expansively construed to

3. In addition to the RICO counts, the jury convicted Eugene Boffa, Sr. and Chandler Lemon of seven counts of mail fraud. The jury found that Eugene Boffa, Sr. had not committed the four predicate acts in connection with another labor switch that he allegedly engineered at the Crown Zellerbach Corporation's plant at Newark, Delaware.

prohibit all schemes to defraud by any means of misrepresentation that in some way involve the use of the postal system. *United States v. Pearlstein*, 576 F.2d 531, 534 (3d Cir. 1978).

In accordance with the statutory policy of preventing the use of the mails to further such fraudulent schemes, most courts have rejected the argument that 18 U.S.C. §1341 was intended to prohibit only schemes to defraud individuals of money or property. *See, e.g., United States v. States*, 488 F.2d 761, 763-64 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974); *United States v. Lewis*, 514 F. Supp. 169, 172-77 (M.D. Pa. 1981). Relying on the broad purposes of the statute, these courts have held that the mail fraud statute prohibits schemes to defraud individuals of "intangible" interests or rights as well. *But cf.* Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions under the Mail Fraud Statute*, 47 U. Chi. L.Rev. 526, 566 (1980) (legislative history of 18 U.S.C. §1341 "indicate[s] that the statute only reaches schemes that have as their goal the transfer of something of economic value to defendant").

Thus, courts have sanctioned mail fraud prosecutions based on deprivations of a variety of intangible rights. *See United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) (client's right to "undivided loyalty" of attorney); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 988 (1981) (employer's right to the honest and faithful service of employees); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980) (same); *United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979) ("time, effort and expectations"); *United States v. Louderman*, 576 F.2d 1383 (7th Cir.), *cert. denied*, 439 U.S. 896 (1978) (privacy rights); *States*, 488 F.2d at 765 ("certain intangible political rights");

Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert denied*, 313 U.S. 574 (1941) (public's right to a public official's honest, faithful, and disinterested services); *United States v. Fineman*, 434 F. Supp. 189, 195 (E.D. Pa. 1977) (same). In perhaps the broadest statement of the reach of 18 U.S.C. §1341, the United States Court of Appeals for the Fourth Circuit observed that the mail fraud statute proscribes any scheme "that is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play, and right dealing." *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), *conviction aff'd in relevant part*, 602 F.2d 653 (1979) (in banc), *cert. denied*, 445 U.S. 961 (1980); *See also United States v. Serlin*, 538 F.2d 737 (7th Cir. 1976).

Although we have not had occasion either to accept or reject the "intangible interest or right" theory of mail fraud, we find the reasoning employed by these courts persuasive, and thus recognize that a scheme to deprive persons of intangible rights or interests may be within the ambit of 18 U.S.C. §1341. We do not believe that mail fraud prosecutions based on this theory are boundless, however, and we may not extend the reach of 18 U.S.C. §1341 beyond the limits envisioned by Congress. Unfortunately, ascertaining those limits is no easy task; the legislative history of the mail fraud statute, which was first enacted in 1872, is of little assistance in determining whether Congress intended the statute to reach schemes to deprive individuals of a particular "intangible" right. *See Von Barta*, 635 F.2d at 1005.

We are not, however, entirely without congressional guidance. When construing a statute, courts generally may not accord great weight to expressions of intent by subsequent Congresses. *See Consumer Product Safety*

Commission v. GTE Sylvania, 447 U.S. 102, 117 (1980). Nonetheless, the Supreme Court has recognized that such an examination may, in some cases, help define vague enactments. *Labor Board v. Drivers Union*, 362 U.S. 274, 291-92 (1960) ("Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, if read literally, the words might permit."). *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *In re Perisco*, 522 F.2d 41, 64-65 (2d Cir. 1975). We believe that an examination of the language and the legislative history of a federal statute is necessary to determine whether it can serve as the source of an intangible right in a mail fraud prosecution. *See United States v. DeLaurentis*, 491 F.2d 208, 212 (2d Cir. 1974); *United States v. Johnson*, 390 U.S. 563, 564-66 (1968) (examining legislative history of the Civil Rights Act of 1964, 42 U.S.C. §2002a, to determine whether prosecution for conspiracy to deprive individuals of rights guaranteed by that Act was permissible under federal civil rights conspiracy statute, 18 U.S.C. §241 (1976)). As a matter of statutory construction, we are unwilling to sanction mail fraud prosecutions for schemes to deprive individuals of a particular intangible right when such a prosecution would contravene the intent of the Congress that created that right. *Cf. Great American S&L Association v. Novotny*, 442 U.S. 366, 372-76 (1979) (civil rights action under 42 U.S.C. §1985(3) based on deprivations of rights guaranteed by Civil Rights Act of 1964 impermissible where such action would undermine policies of Title VII of that Act).

With these principles in mind, we proceed to examine the indictment's allegations relating to mail fraud.

A.

The indictment alleges that, in connection with the labor switches at Inland Container and Continental Can, appellants deprived employees of:

> Economic benefits they enjoyed through rights guaranteed them under the National Labor Relations Act, [29 U.S.C. §157], to self-organization, to form, join and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining and other mutual aid and protection.

The premise of appellants' argument is that this portion of the indictment alleges a deprivation of "intangible rights" guaranteed by section 7 of the NLRA. From this, they contend that, in enacting the NLRA, Congress did not intend that violations of employees' section 7 rights could serve as the basis for a mail fraud prosecution.

The Government vigorously disputes appellants' characterization of the indictment. It contends that appellants' mail fraud violations did not rest on the commission of unfair labor practices. Instead, the Government asserts that the indictment alleges schemes to deprive employees of *economic interests* obtained through rights guaranteed them by the NLRA. Because, in the Government's view, the "scheme or artifice" involved a deprivation of employees' property interests, it falls squarely within the traditional scope of the mail fraud statute.

We believe that appellants' characterization of the scheme alleged in the indictment is more accurate. Reduced to its essence, the indictment alleges that the scheme deprived employees not of tangible property or money, but of their interest in rights guaranteed by the

NLRA. That the Government has couched its allegations in terms of "economic benefits" does not alter our conclusion. We believe it is neither analytically helpful nor practically possible to distinguish the "economic benefits" of rights guaranteed by the NLRA from the rights themselves. To be sure, the rights guaranteed by section 7 are of economic value to employees covered by the NLRA. However, we cannot conclude that, as a consequence, statutory rights are transformed into analytically distinct "economic benefits." The source of those "economic benefits" lies exclusively in the statute, and appellants could deprive employees of those benefits only by committing one or more unfair labor practices.

Our conclusion as to the nature of the indictment crystallizes the issue before us. We must determine whether a scheme to deprive employees of rights guaranteed by section 7 of the NLRA is within the ambit of the mail fraud statute. This determination requires an examination of the congressional policies underlying the NLRA. We find two such policies particularly pertinent: the remedial nature of the Act and the primacy of the National Labor Relations Board in resolving unfair labor practice disputes.

1.

The National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 197-98 (1933), from which the rights enumerated in section 7 derive, authorized the Justice Department to institute criminal prosecutions against employers who refused to take corrective measures after violating employees' statutory rights. *See* Rep. No. 972, 74th Cong. 1st Sess. 2 (1935). The first draft of the NLRA introduced in the House of Representatives made the commission of certain unfair labor practice a misdemeanor punishable by a $500 fine. H.R. 8423, 74th Cong., 1st Sess. (1934), *reprinted in* Legislative History

of the National Labor Relations Act of 1935 1128, 1131 (1949). In the final version of the Wagner Act, however, Congress provided no such criminal penalties for unfair labor practices. Instead, section 10(c) of the NLRA provides that upon finding that a party has committed an unfair labor practice, the National Labor Relations Board (NLRB) "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay." 29 U.S.C. §160(c) The House Report envisioned the "affimative action" as remedial in nature, to "effectuate the policies of the bill; i.e. as defined in section 1, to encourage the practice of collective bargaining and to protect the exercise by the worker of [his rights under the Act]." H. Rep. No. 972, at 21.

The Supreme Court has emphasized the remedial rather than punitive nature of the Act. In *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), the Court held that an order of the NLRB penalized the employer for committing an unfair labor practice, and was therefore impermissible. The Court observed:

> The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties of fines in vindication of public right . . . Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

Id. at 10. The Court stated that the Act's remedial measures "relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and

have been made whole." *Id.* at 11. *See Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938) ("The power to command affirmative action is remedial, not punitive.").

Although we are not confronted with a punitive order of the NLRB, the principles articulated in *Republic Steel* are highly relevant. They do not merely represent limitations upon the Board's power to issue certain types of orders, but rather reflect the general policy relating to the remedial nature of the Act. This policy, which we regard as an important aspect of the overall statutory scheme, suggests that Congress did not intend to create new criminal sanctions when it endowed employees with section 7 rights.

Debates on the Taft-Hartley amendments to the NLRA in 1947 highlight Congress's intent that violations of the civil provisions of the Act were to be without criminal consequences. In response to a question on the Senate floor, Senator Taft explained that the term "unlawful" in section 303(a) of the Taft-Hartley Act, 29 U.S.C. §187(a), did not mean that labor organizations could be prosecuted for conspiring to violate that provision under the federal conspiracy statute. 18 U.S.C. §88 (1940):

> Mr. Pepper: . . . Was it the desire of the Senator from Ohio to make those acts unlawful?
>
> Mr. Taft: That is correct. I may say that the definition is exactly the same as we had of an unfair labor practice. The effect of making it unlawful is simply that a suit for damages can be brought . . . There is no criminal penalty of any kind . . .
>
> . . .
>
> Mr. Baldwin: As I understand, what we are considering would be unlawful in the sense only that it would create a civil liability for damages. It is not

unlawful in the sense that there would be any criminal liability?

Mr. Taft: It is unlawful. There may be other results arising from it, but there would not be a criminal penalty in my opinion, because there is no criminal penalty prescribed in the amendment.

93 Cong. Rec. 5060-61 (May 9, 1947), *reprinted in* Legislative History of the Labor Management Relations Act of 1947 1371-73 (1974). Similarly, the absence of any criminal sanctions in section 8 of the NLRA suggests that Congress did not contemplate that employers would be subject to criminal liability, even by operation of another statute, as a result of committing an unfair labor practice.

To permit mail fraud prosecutions grounded on unfair labor practices would be to impose criminal penalties for conduct that, until now, has been remediable solely under the NLRA. Indeed, we are aware of only two cases in which the Government attempted to use sections 7 and 8 of the NLRA as the basis for a criminal prosecution. In *United States v. DeLaurentis*, the United States Court of Appeals for the Second Circuit held that the right of employees to refrain from joining in concerted activities guaranteed by section 7 of the NLRA cannot form the basis of a criminal prosecution under 18 U.S.C. §241.[4]

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4. 18 U.S.C. §241 provides, in relevant part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same:

. . .

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

See United States v. Bailes, 120 F. Supp. 614 (S.D. W.Va. 1954) (also rejecting §241 prosecution based on unfair labor practice). Observing that the legislative history of the NLRA "clearly indicates that criminal penalties were not intended for violations of the National Labor Relations Act," 491 F.2d at 212, the court declined to permit the "huge expansion of federal criminal liability of employers and union officials envisioned by the Government." *Id.* at 214. We share the *DeLaurentis* court's reluctance to sanction, for the first time, a criminal prosecution based on an unfair labor practice, and agree that "[t]he care and compromise that went into [sections 7 and 8] suggest that Congress would not silently import sweeping criminal liability into the regulation of labor relations." *Id.*

2.

Another congressional policy underlying the NLRA is pertinent in ascertaining the reach of the mail fraud statute: the exclusive authority of the NLRB to decide whether conduct of employers or employees constitutes an unfair labor practice. The Supreme Court has consistently emphasized the primacy of the NLRB in resolving unfair labor practice disputes. *See National Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) (NLRA "commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practices"). This principle serves the important statutory policy of insuring that a uniform federal labor law is developed by an administrative agency with special expertise in that area. *See Motor Coach Employees v. Lockridge*, 403 U.S. 274, 296 (1971); *Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953). We believe the "overriding interest in a uni-

form, nationwide interpretation of the federal statute by the centralized expert agency created by Congress," *New York Telephone Co. v. New York Labor Department*, 440 U.S. 519, 528 (1979), casts serious doubt on the proposition that Congress intended schemes to defraud employees of section 7 rights to fall within the ambit of the mail fraud statute.

Under this portion of the indictment, the district court and jury were required to address precisely the type of purely statutory questions that Congress intended only the Board to resolve: whether the object of appellants' scheme constitutes an unfair labor practice. For example, in charging the jury, the district court explained what, in its view, would constitute an unfair labor practice:

> An employer violates his duty to bargain collectively and deprives his employees of that right if he unilaterally modifies or terminates a term or terms of a collective bargaining agreement relating to wages, hours of work, or other terms and conditions of employment without first (1) serving written notice upon the other party to the contract of the proposed termination or modification at least sixty days prior to the proposed termination or modification; (2) offering to meet and confer with the other party for the purpose of negotiating a new contract containing the proposed modifications; (3) notifying the Federal Mediation and Conciliation Service and any comparable state or local agencies within thirty days after notification of the existence of the dispute; and (4) continuing the present contract in full force for at least sixty days after the required notification.
>
> Similarly, if an employer is replaced by a second employer which is an alter ego of the first, and the alter ego at that time subsequently modifies or termi-

nates a term of the collective bargaining agreement relating to wages, hours, or other conditions of employement without following the required procedures, the Section 157 rights of the affected employees are violated and those employees have been deprived of property for the purposes of the Mail Fraud Statute.

As this instruction makes clear, the judge and the jury were engaged in balancing the interests of employers and employees, a task that Congress entrusted exclusively to the NLRB. As the *DeLaurentis* court observed, "whether or not a 'right' exists under §7 of the Labor Act and whether or not that right has been violated are frequently complex questions of law—hardly issues that are best resolved by a jury in a criminal trial." 491 F.2d at 213. We believe that Congress did not envision that the mail fraud statute would serve as an exception to its policy of insuring a uniform interpretation of the NLRA by an administrative agency with special expertise in the labor area.

Because we perceive a sufficiently strong indication that Congress did not intend unfair labor practices to have any criminal consequences, we hold that a scheme to deprive employees of section 7 rights does not constitute a crime under the mail fraud statute.

B.

The indictment alleges that appellants deprived employees of the "[e]conomic benefits they enjoyed through rights they had under the collective bargaining agreement." We believe that a scheme to defraud employees of these economic benefits, such as wages and seniority rights, lies squarely within the ambit of the mail fraud statute. The source of such benefits was the contract between the appellants and the employees. Although they may have been obtained as a result of employees'

exercise of rights guaranteed by section 7 of the NLRA, these benefits are contractual, not statutory, in nature. While deprivation of section 7 may be vindicated solely through the procedures established for unfair labor practice disputes, we believe the broad language of the mail fraud statute proscribes schemes to deprive an individual of economic benefits that are contained in a collective bargaining agreement. *See United States v. McNeive*, 536 F.2d 1245, 1248-49 (8th Cir. 1976) ("There can be little doubt that . . . schemes are within the scope of §1341 [when] they involve calculated efforts to use misrepresentation or other deceptive practices to induce the innocent or unwary to give up some tangible property interest.").

C.

The indictment also alleges that Eugene Boffa, Sr. and Chandler Lemon deprived employees at the Inland Container plant of "[t]he loyal, faithful, and honest services of defendant FRANCIS SHEERAN in the performance of his duties as the elected and salaried president of [Teamsters] Local 326." A number of courts have sustained mail fraud convictions based on schemes to deprive individuals of similar rights. *See Von Barta*, 635 F.2d at 1005 (employer's right to loyal and honest services of employees); *United States v. Diggs*, 613 F.2d 988, 998 n.54 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (public's right to loyal and honest services of public officials).

There is little doubt that union officials owe union members a fiduciary duty. Section 501(a) of the Labor Mananagement Disclosure Act of 1959 (LMDRA), 29 U.S.C. §501(a) declares that union officials "occupy positions of trust in relation to such organization and its members as a group" and provides that "it is the duty of each such person . . . to refrain from dealing with such

organizations as an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization. . . ." This section imposes fiduciary responsibility in its broadest sense, and is not confined to financial dealings by union officals. *See Sabolsky v. Budzanoski*, 457 F.2d 1245, 1250-52 (3d Cir.), *cert. denied*, 409 U.S. 853 (1972). We believe that the LMDRA established, as a matter of federal law, union members' right to the honest and faithful services of union officials.

Assuming, without deciding, that the LMDRA is the sole source of such a right, we perceive nothing in its legislative history to suggest that Congress intended this intangible right to be outside the ambit of the mail fraud statute. Unlike sections 7 and 8 of the NLRA, with their clearly remedial purpose and carefully structured administrative scheme, section 501(a) merely establishes a standard of duty for union officials, and permits union members to bring actions against officials for breach of that duty. This remedy was clearly not intended to be exclusive. *See* 29 U.S.C. §413 (nothing in this title "shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any other court or tribunal"); Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1372 (1972) ("Congress has never developed a comprehensive and impliedly exclusive plan of federal regulation for union-member relations."). In fact, the statute provides no remedies or sanctions whatsoever against employers or other third parties who cause union officials to breach their fiduciary duties. In short, there is no indication that prosecutions for schemes to defraud employees of the intangible right provided in 29 U.S.C. §501 would contravene any congressional policy. *See United States v. Stout*, 499 F. Supp. 602 (E.D. Pa. 1980) (LMRDA does not preclude mail fraud prosecution for union official's

scheme to defraud his labor union). We therefore believe that a scheme to defraud employees of the loyal, faithful, and honest services of their union official alleges a crime within the scope of the mail fraud statute.

III.

Appellants Eugene Boffa, Sr., Robert Boffa, Sr., and Chandler Lemon next advance a distinct, but not entirely unrelated contention. They suggest that because the mail fraud allegations pertain to activities that at least arguably constitute unfair labor practices, even those portions of the indictment that state crimes under 18 U.S.C. 1341 must be dismissed under the doctrine of primary jurisdiction of the NLRB. Assuming, without deciding, that appellants' conduct is at least arguably prohibited by section 8 of the NLRA[5], we decline to accept the proposition that the NLRA precludes the enforcement of a federal statute that independently proscribes that conduct as well.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court established the parameters of the doctrine of primary jurisdiction of the NLRB: "When an activity is arguably subject to §7 or §8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, and all subsequent decisions that have refined the doctrine of primary jurisdiction, have involved attempts by states to

5. Although we of course express no opinion as to the outcome of an unfair labor practice charge involving appellants' conduct, we note that this court has held that a "corporate shell game" designed to avoid an employer's obligation to bargain collectively constitutes a violation of §8(a)(5) of the NLRA, 29 U.S.C. §158(a)(5). *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3d Cir. 1979).

regulate "arguably protected" or "arguably prohibited" activity. In such cases, the "governing consideration is that to allow states to control activities that are potentially subject to federal regulation involves too great a danger of conflict with federal labor policy." *Garmon*, 359 U.S. at 246. *See Farmers v. Carpenters*, 430 U.S. 290, 301 n.10 (1977); *Air Transport Association of America v. Professional Air Traffic Controllers Organization*, 667 F.2d 316, 323 (2d Cir. 1981). The Supreme Court has not considered the question now before us: whether the doctrine of primary jurisdiction operates to "displace" a federal criminal statute that independently prohibits conduct that is also arguably prohibited by the NLRA.

Appellants argue that the principal of primary NLRB jurisdiction as developed by *Garmon* and its progeny is not limited to concurrent state regulation of conduct that is arguably prohibited by the NLRA. Because the congressional policy favoring the regulation of labor disputes by the NLRA may be undermined as much by conflicting federal regulation as by concurrent state regulation, appellants suggest that the doctrine must preclude a mail fraud prosecution involving activity that is arguably prohibited by the NLRA. Although this position has a superficial appeal, a close examination of the policies underlying the doctrine of primary jurisdiction reveals its flaws.

First, the doctrine of primary NLRB jurisdiction is of constitutional dimension; it is grounded, at least in part, upon considerations of federal supremacy. *See Garmon*, 359 U.S. at 244 ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and regulation imposed by State law."). No such constitutional concerns are implicated when a federal criminal statute is said to impinge upon the primary jurisdiction of the NLRB.

Second, it is a judicially created doctrine, born out of the Supreme Court's "ongoing efforts to decipher the presumed intent of Congress." *Sears, Roebuck, & Co. v. Carpenters.* 436 U.S. 180, 188 n. 12 (1978). *See Lockridge,* 403 U.S. at 286. Accordingly, in determining whether state regulation of "arguably prohibited" conduct must yield to the NLRA, courts must ascertain the extent to which Congress intended such conduct to be regulated by federal, and not state law. When conduct is regulated both by the NLRA and another federal statute, the focus is not on the federal-state balance envisioned by Congress. Rather, the question becomes whether, by enacting the NLRA, Congress intended to work an implied repeal of existing federal criminal statutes insofar as they regulate "arguably prohibited" conduct. *See United States v. Burnett,* 505 F.2d 815, 816 (9th Cir. 1974) (per curiam), *cert. denied sub nom. Lyon v. United States,* 420 U.S. 966 (1975) ("To assume . . . that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute . . . is, in effect, to accomplish a partial repeal of the general statute.").

The Supreme Court has repeatedly emphasized the strong judicial policy against implied repeals. *E.g. Posadas v. National City Bank,* 296 U.S. 497, 504-05 (1936). A new statute will not be read as partially repealing a prior statute unless a "positive repugnancy" exists between the two. *Blanchette v. Connecticut General Insurance Corp.,* 419 U.S. 102, 134 (1974). The Court has cautioned that "[i]n the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari.* 417 U.S. 535, 550 (1974). Moreover, to constitute an implied repeal, the later-enacted statute must cover the entire field occupied by the earlier one. *United States v. Tynen,* 78 U.S. (11 Wall.) 88, 92 (1870).

Appellants point to no evidence that Congress intended to repeal federal statutes that regulate criminal conduct in the labor field, nor have we discovered such an intent. If the legislative history of the NLRA points in any direction, it suggests that Congress did not intend the NLRA to displace either state or federal laws relating to fraud or violence. *See* S. Rep. No. 573, 74th Cong., 1st Sess. 17 (1935) ("the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of . . . fraud and violence [by unions or union members]"). *See United States v. Thordarson*, 646 F.2d 1323, 1331 (9th Cir.), *cert. denied*, 102 S. Ct. 601 (1981) ("Nothing in the language or legislative history suggests that federal criminal statutes . . . should not . . . be available to punish union members and officials who try to achieve collective bargaining goals by reason of . . . violence."). Nor can it be said that the two statutes are in irreconcilable conflict. That the mail fraud statute makes criminal activity that may also be proscribed by the NLRA does not render the former statute "positively repugnant" to the latter.

Moreover, the overlap between the two statutes is rather circumscribed. In *United States v. O'Brien*, 617 F.2d 299 (1st Cir. 1979), *cert. denied*, 446 U.S. 919 (1980), the court rejected the contention that section 2(a)(1) of the Commodities Futures Trading Act (CFTA), 7 U.S.C. §2(a)(1), which provides that the Commodities Futures Trading Commission "shall have exclusive jurisdiction" over transactions subject to regulation by the Commission, precluded a prosecution under the mail fraud statute. Applying the principal announced in *Tynen*, the court observed that the "CFTA, which prohibits only interstate communications in commodities fraud, obviously does not cover the entire ground occupied by 18 U.S.C. §1341 . . . which appl[ies] to mail . . . communications in furtherance of *any* scheme to defraud." *Id.* at 310. Although some "schemes

to defraud" may also constitute unfair labor practices, the overlap between the NLRA and the mail fraud statute is similarly limited. The latter statute prohibits the use of the mails in furtherance of any fraudulent scheme, whereas the relevant provisions of section 8 of the NLRA proscribe conduct that interferes with the exercise of employees' statutory rights.

We thus conclude that the "arguably prohibited" nature of appellants' conduct cannot exempt them from prosecution under the mail fraud statute. *Cf. Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 736 (10th Cir. 1980), *cert. denied*, 102 S. Ct. 132 (1981) (federal interest in protecting citizens from conspiracies to violate civil rights statutes sufficient to permit action under 42 U.S.C. §1985(3) involving "arguably prohibited" conduct); *but cf., Iowa Beef Processors, Inc. v. Gorman*, 476 F. Supp. 1382 (N.D. Iowa 1979) (union members' counterclaim under §1985(3) preempted by NLRA where complaint, in substance, alleged only unfair labor practice).

IV.

We now consider the effect of our conclusions upon the convictions of Eugene Boffa, Sr. and Chandler Lemon under the mail fraud counts (V through XI) of the indictment, and upon the conspiracy and substantive RICO convictions of each of the four appellants under counts I and II of the indictment.

A. Mail Fraud

We have concluded that, apart from the allegation relating to the deprivation of section 7 rights, counts V through XI of the indictment allege crimes under the mail fraud statute. Because the jury may have relied on the section 7 allegations in convicting Eugene Boffa, Sr.

and Chandler Lemon of seven counts of mail fraud, however, we must reverse those convictions and remand for a new trial on the proper portions of counts V through XI. *See United States v. Kavazanjian*, 623 F.2d 730, 739 (1st Cir. 1980); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

B. *RICO*

Each appellant was convicted on the conspiracy and substantive RICO counts of the indictment. The RICO convictions of Robert Boffa, Sr. and Chandler Lemon were based exclusively upon predicate acts of mail fraud. Because the jury may have impermissibly relied on the section 7 allegations in concluding that they violated the mail fraud statute, we will reverse their RICO convictions and remand for a new trial on the proper portions of counts I and II.

The RICO convictions of Eugene Boffa, Sr. and Louis Kalmar, Sr. are unaffected by our conclusion as to the mail fraud predicate acts. In addition to the mail fraud predicates, Eugene Boffa, Sr.'s RICO convictions are supported by five violations of 29 U.S.C. §186(a) (Taft-Hartley) and one violation of 18 U.S.C. §1503 (obstruction of justice). Kalmar's RICO convictions are grounded exclusively upon violations of 18 U.S.C. §186(a).

V.

Because the RICO convictions of appellants Louis Kalmar, Sr. and Eugene Boffa, Sr. are supported by the requisite number of predicate acts even after dismissal of the mail fraud counts based on alleged section seven violations, we proceed to examine the additional grounds they contend require reversal.

The jury found that Boffa and Kalmar committed four violations of 29 U.S.C. §186(a), which makes it "unlawful for any employer or association of employers . . . to . . . deliver . . . any money or other thing of value to any officer or employee of a labor organization with intent to influence him in any respect to any of his actions. . . ." The indictment charges:

> EUGENE BOFFA, SR., and LOUIS KALMAR, SR. unlawfully, willfully and knowingly did cause UCI to deliver the free use for a month, as specified below, of a 1975 Lincoln Continental . . . to Francis Sheeran by paying the monthly lease payment for this vehicle to APL [All Purpose Leasing] with intent to influence Francis Sheeran in respect to his actions, decision and duties as President of IBT Local 326; all in violation of [29 U.S.C. §186(a)(4) & (d)].

The indictment lists seven racketeering acts, representing the dates on which APL received UCI's monthly payment, and the month of free use attributable to each payment. The jury found that appellants had committed four Taft-Hartley violations between July and October, 1975.

A.

Appellants do not contend that they did not violate Taft-Hartley; rather, they urge that under the facts of this case, they could have violated it only once. In considering this argument we enter the often metaphysical realm of multiplicity—the charging of a single statutory offense in different counts of an indictment. Recognizing the danger posed by "the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown v. Ohio*, 432 U.S. 161, 169 (1977), the Supreme Court has cautioned that units of prosecution are determined by reference to the applicable statute. *United*

States v. C.I.T. Corp., 344 U.S. 218 (1952). The operative language of 29 U.S.C. §186(a) in this respect is the "deliver[y of] . . . money or other thing of value." This court has held that each such delivery to a union official constitutes a separate Taft-Hartley violation. *See United States v. Alaimo*, 297 F.2d 604 (3d Cir. 1961), *cert. denied*, 369 U.S. 817 (1962). Because the Act proscribes indirect, as well as direct payments to union officials, *see Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959), *cert. denied*, 361 U.S. 929 (1960), it is also clear, and we do not understand appellants to dispute, that separate indirect payments may constitute separate violations.

Thus, to the extent that appellants attack the indictment, their claim is without merit. We believe that it properly alleges that by paying APL four times for the monthly use of the 1975 Lincoln, UCI delivered four "things of value" to Sheeran. As we understand it, however, appellants' primary contention concerns the lack of proof necessary to establish multiple Taft-Hartley violations, and thus to satisfy the RICO plurality requirement.

B.

The following is a summary of the evidence presented at trial concerning the automobile lease transaction. Codefendant Robert Rispo and government witness Charles Allen testified that Eugene Boffa, Sr. and Sheeran agreed that Sheeran could use automobiles furnished by Boffa without charge. Rispo stated that Sheeran told him that he was to have free use of the car during the entire lease period, and that Sheeran did not have to renew on a monthly basis. Allen also testified that Sheeran had boasted that he was not expected to pay for the cars.

Eugene Boffa, Sr. and Louis Kalmar, Sr. each owned fifty percent of UCI and APL. Although both managed

UCI, Kalmar did not participate in the management of APL, Eugene Boffa, Sr. purchased the 1975 Lincoln Continental on March 4, 1975 with UCI funds, but the car was titled in the name of APL. The evidence suggested that it was purchased specifically for Sheeran. The transaction was treated as a loan receivable from UCI to APL on the books of UCI and a loan payable from APL to UCI on the books of APL.

There was conflicting evidence as to whether UCI or Sheeran was the lessee of the car. A Ford Motor Company lease security agreement listed UCI as the lessee of the car, while a written lease executed between Sheeran and APL dated March 21, 1975, designated Sheeran as the lessee. The Government also offered into evidence dual monthly invoices on the car from APL. The invoices, of the same date for each month, were for the same car and purportedly went both to UCI and Sheeran. A bookkeeper for APL who regularly handled monthly billing testified, however, that she had not processed any invoices from APL to Francis Sheeran. The Government introduced monthly checks from UCI to APL that included that payments on the 1975 Lincoln used by Sheeran, two of which were signed by Kalmar. The evidence showed that each such payment was credited to the UCI account at APL. Bookkeepers at APL testified that Sheeran's name was not in the records of APL during the lease period, and that his name was inserted in the books only after a grand jury subpeonaed the records.[6]

Appellants argue that under these facts, no jury could conclude beyond a reasonable doubt that each monthly payment constituted a thing of value, and thus a separate Taft-Hartley violation. In support of this conten-

6. The falsification of APL's records forms the basis for the indictment's obstruction of justice allegations against Eugene Boffa, Sr.

tion, appellants first point out that Sheeran had no knowledge or interest in the mechanics of the arrangement between UCI and APL. He knew only that he was receiving continuous, uninterrupted use of the automobile for free; "no evidence was presented that he had any comprehension that he was getting free 'use per month' of the car."

This argument misconceives the relevant inquiry under 29 U.S.C. §186(a) by assuming that the focus is on what Sheeran received. It is not. Our concern is with what appellants delivered. Thus, it is immaterial whether Sheeran knew that the car was paid for on a month-to-month basis, or even whether the car was owned by UCI or APL.

Appellants' second argument is more troubling. They contend that because of the substantial identity of APL and UCI, the monthly payments were merely a sham, in the nature of intracorporate transfers, that served only to cover up the true nature of the transaction: a gift from UCI to Sheeran of four months' free use of the automobile. In appellants' view, the lease payments could not constitute "things of value" because UCI, in effect, already owned the automobile. Thus, when UCI gave Sheeran the car for four months, it gave him a single "thing of value"—the use of its car—for a four-month period. Appellants urge that the Government's attempt to cast this unitary delivery into four temporal units is impermissible.

The Government's position is that UCI acquired its interest in the automobile only by virtue of its monthly lease payments to APL. With each lease payment, UCI acquired one month's use of the car, and it was this "thing of value," the Government contends, that it gave to Sheeran on four separate occasions.

It is not our role to resolve disputed questions of fact on appeal. Rather, we must determine whether a jury could reasonably conclude that each monthly lease payment made by UCI was a separate "thing of value." We believe that a reasonable jury could so conclude. First, UCI and APL were in fact separate corporate entities, incorporated twelve years apart, and engaged in different businesses. Second, UCI was actually billed each month by APL for the use of the car. Third, it is undisputed that UCI paid APL each month for the use of the car. Finally, these payments were recorded on the books of APL as genuine accounts receivable. From this, the jury could have concluded that UCI was treated by APL in the same manner as any other lessor would have been, and that had UCI stopped monthly payments on the car. Sheeran's use of the car would have been terminated. Such an inference would support the jury's conclusion that each payment was a "thing of value" under 29 U.S.C. §186(a).

C.

Nor do we believe that the district court's charge to the jury on the question of multiplicity was so deficient as to require reversal. After instructing that the Government must prove each element of a Taft-Hartley violation beyond a reasonable doubt, the court stated:

> The term "deliver" means to place or cause to be placed a thing of value within the actual or constructive possession or control by another by direct or indirect means. A "thing of value" used in the statute is anything other than money which has some value. Racketeering Acts 15, 17 through 26 and 37 through 43 allege that the thing of value delivered was the free use of an automobile for a month. . . . It is for you to determine from the evidence whether these items are

things of value and whether they were delivered or caused to be delivered by the defendants so charged.

If you find beyond a reasonable doubt that UCI made monthly payments to APL in discharge of Sheeran's monthly rental obligation for the use of the automobile, you may find that each payment constituted a separate delivery of a thing of value.

We think this charge adequately informed the jury that to find that appellants had violated 29 U.S.C. §186(a) more than once, it must conclude beyond a reasonable doubt that each delivery constituted a thing of value.[7]

D.

Kalmar also challenges his RICO convictions on the ground that the Government introduced insufficient evidence of his involvement in the monthly payments—a single check from UCI to APL signed by him[8]—to support more than one Taft-Hartley conviction. We have reviewed this contention in light of the entire record, and find it without merit. The jury could have reasonably inferred that Kalmar had directed each of the four payments from the following evidence: 1) Kalmar's control and ownership of fifty-percent of UCI; 2) the testimony of a former UCI controller that Kalmar was aware that

7. Kalmar contends that the second paragraph of the instruction required the jury to conclude that Sheeran had an actual lease obligation to APL and that UCI's monthly payments were actually credited to Sheeran's account. We think this interpretation of the charge is overly literal. The essence of the instruction is that the jury must find that UCI paid APL on a monthly basis for each month that Sheeran used the car. Moreover, even were we to accept Kalmar's interpretation, we would regard it as harmless error.

8. Although the Government charged that Kalmar's signature on two checks—one on March 24, 1975 and one on August 8, 1975—supported two distinct Taft-Hartley violations, the jury acquitted Kalmar of the alleged March violation.

Sheeran was using the car; and 3) Kalmar's signature on one of the four checks.

VI.

Appellants raise the following additional challenges to their RICO convictions.

A.

Appellants argue that the district court failed to instruct the jury that to convict a defendant of a RICO conspiracy, it must find that each appellant personally agreed to commit two predicate acts specified in the indictment. They rely principally on the following passage from *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978):

> To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes.*

Id. at 903 (emphasis in original).

In this case, the district court instructed the jury that in order to convict a defendant of a RICO conspiracy, it must conclude beyond a reasonable doubt "that the defendant, with knowledge of the conspiracy, willfully became a member of that conspiracy by agreeing to participate directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity. . . ." The district court defined a "pattern of racketeering" as the commission of "at least two of the acts of racketeering alleged in the indictment." Because we perceive no material difference between the requested jury instruction and the one given by the district court, we

conclude that the court did not err in denying appellants' request.

B.

Appellants argue that the indictment's RICO conspiracy charge violates the Constitution's ex post facto clause, and that the district court's instructions failed to cure the constitutional deficiency. Because they did not raise this issue before the district court, appellants urge that the defect is plain error under Fed. R. Civ. P. 52(b).

The indictment charges that appellants conspired to violate 18 U.S.C. §1962(c) "from on or about January 1, 1969, up to and including the date of the filing of this indictment [July 14, 1980]." RICO became effective on October 15, 1970. From this, appellants contend that the jury could have convicted them of RICO conspiracy on the basis of an agreement to violate the substantive provisions of RICO that had been formed and existing only before the effective date of the statute. Appellants rely on *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), in which the court held that, at least in the absence of curative jury instructions, an indictment that charges defendants with a conspiracy prior to the effective date of RICO violates the "ex post facto principle embodied in the due process clause" of the fifth amendment. *Id.* at 420.

The *Brown* decision was grounded on the court's inability to conclude that the defendants' conspiracy convictions were based only on conspiracies that were in existence after the effective date of the statute. In this case, however, the jury was instructed that it could not convict appellants of a RICO conspiracy unless it found that the conspiracy existed after July 14, 1975. Although the instruction was given because of the five year statute of limitations for RICO offenses, 18 U.S.C. §3282, it

allows us to conclude with certainty that the jury verdict was not based on a conspiracy that existed only prior to the effective date of RICO. We thus find no reversible error.

C.

Appellants contend that the district court failed to instruct the jury that the predicate acts alleged in the indictment must be related to each other to establish the "pattern of racketeering activity" necessary for a RICO conviction. Because no objection was made in the district court, appellants urge, as they must, that this failure constitutes plain error under Fed. R. Civ. P. 52(b). The plain error doctrine, however, does not aid appellants. Because appellants do not assert that the predicate acts charged in the indictment were in fact unrelated, they cannot argue that they have been prejudiced by the district court's failure to give the instruction they now argue was necessary.

D.

Kalmar argues that a Taft-Hartley violation is a lesser included offense of a substantive RICO violation, and that the district court erred in refusing his request for a lesser included offense instruction. We disagree.

Congress generally does not intend to permit multiple convictions or consecutive punishment where the same criminal activity constitutes greater and lesser included offenses. *Blockburger v. United States*, 284 U.S. 299 (1932). The Supreme Court, however, has held that *Blockburger* is merely a rule of statutory construction, *Whalen v. United States*, 445 U.S. 684, 691 (1979), and that where Congress obviously intended to permit multiple convictions and consecutive punishment, *Blockburger* will not prevent it. Federal courts of appeals have consistently held that Congress did not intend for a RICO conviction to immunize a defendant from a con-

viction and sentence on the predicate crime. *Eg. United States v. Rone*, 598 F.2d 564, 571 (9th Cir.), *cert. denied*, 445 U.S. 946 (1980). "There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the . . . predicate crimes which make up the racketeering pattern. . . ." *See United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Boylan*, 620 F.2d 359 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); *United States v. Rone*, 598 F.2d 564 (9th Cir.), *cert. denied, sub nom. Little v. United States*, 445 U.S. 946 (1980).

In *Sansone v. United States*, 380 U.S. 299 (1932), the Supreme Court used a test identical to the one in *Blockburger* to determine when a defendant is entitled to a lesser included offense instruction. Although the two offenses meet the facial requirements of the *Sansone* test, a lesser included offense instruction would be inconsistent with Congress's intention to permit multiple convictions and consecutive punishment for RICO and predicate crimes. Under Kalmar's requested instruction,[9] the jury would have first considered Kalmar's guilt or innocence on the RICO charge; only after it had acquitted Kalmar on that charge could it consider his guilt or innocence on the Taft-Hartley violation. We believe that such an instruction is inconsistent with congressional intent and hold that the district court properly rejected it.

E.

Eugene Boffa, Sr. contends that he was denied effective assistance of counsel because his prior attorney cross-examined a government witness whom he had previously represented in her successful attempt to obtain immunity. Because this issue was not raised in the district

9. Kalmar requested the instructions set out in Devitt & Blackmar, *Federal Jury Practice and Instructions*, §§18.05-18.07.

court, we decline to consider it on direct appeal. *See, e.g., United States v. Jackson*, 649 F.2d 967, 973 (3d Cir. 1981).

F.

Appellants urge that the judgments of forfeiture must be reversed for a number of reasons. Although they claim that these objections were raised before the district court, we have examined the record citations supplied by appellants, and cannot agree. These arguments, which primarily concern the special interrogatories submitted to the jury, should not be considered for the first time on appeal.

One contention does, however, merit additional discussion. Appellants argue that the judgments of forfeiture must be reversed because the indictment failed to specify the extent of their interests that were subject to forfeiture, as required by Fed. R. Crim. P. 7(c)(2) ("No judgment of forfeiture may be entered . . . unless the indictment . . . shall allege the extent of the interest or property subject to forfeiture.").

The indictment alleges that "all [of each appellants'] control and ownership" in the enumerated corporations was subject to forfeiture. Appellants contend that the indictment is deficient because it fails to specify each appellant's interest in the various corporations. In *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit rejected a similar contention:

> The validity of appellant's contention rests upon his construction of the Rule to read ". . . the indictment or the information shall allege the . . . property subject to forfeiture." We find this interpretation to be grammatically implausible and to subvert the literal terms of the Rule.

We share the Second Circuit's interpretation of the rule, and hold that by alleging that all of appellants' interest in the enumerated corportions was subject to forfeiture, the indictment alleged the "extent of the interest or property subject to forfeiture," as required by Rule 7(c)(2). *See United States v. Bergdoll*, 412 F. Supp. 1308, 1318-19 n.17 (D.Del. 1976).

G.

Appellants raise a number of other contentions involving 1) the district court's failure to include certain instructions requested by the defense in its charge to the jury; 2) the special interrogatories and summary verdict sheet submitted to the jury; and 3) allegedly improper prosecutorial comments made during summation. We have examined these contentions in light of the entire record and find no reversible error.

VII.

We will reverse the convictions of Eugene Boffa, Sr. and Chandler Lemon of seven counts of mail fraud and remand for a new trial on the proper portions of counts V through XI of the indictment.

We will reverse the conspiracy and substantive RICO convictions of Robert Boffa, Sr. and Chandler Lemon, and remand for a new trial on the proper portions of Counts I and II of the indictment. In addition, we will vacate the judgments of forfeiture entered after their convictions on these counts. *See* 18 U.S.C. §1963(a) (interest or property shall be forfeited by "[w]ho[m]ever violates any provision of section 1962 of this chapter").

Because we have not disturbed the jury's findings on the six racketeering activities that support the RICO convictions of Eugene Boffa, Sr.—five violations of 29 U.S.C. §186(a) and one violation of 18 U.S.C. §1503—we will affirm his conspiracy and substantive RICO con-

victions. The district court may have considered the mail fraud predicate acts in sentencing, however, and thus we will direct that the district court vacate such sentence and resentence Boffa in light of our invalidation of the indictment's mail fraud allegations. Finally, we will vacate the judgment of forfeiture as it applies to Boffa, so that the district court may have the opportunity to consider whether our disposition of this appeal in any way affects its prior forfeiture order.

We will affirm the RICO convictions of Louis Kalmar, Sr., which were grounded entirely upon four violations of 29 U.S.C. §186(a). We will, however, vacate the judgments of forfeiture entered against Kalmar to permit the district court to consider the effect, if any, of our disposition of this appeal upon the forfeiture order.[10]

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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10. Kalmar asks us to reverse his RICO convictions and remand for a new trial if we find the mail fraud allegations in the indictment deficient. Although he recognizes that his RICO convictions were not based upon violations of 18 U.S.C. §1341, he asserts that a new trial is necessary "due to the prejudicial spillover effect" from the evidence introduced at trial concerning the labor switches. We believe the special interrogatories submitted to the jury provided an adequate safeguard against such prejudice. We believe that they insured that in convicting Kalmar, the jury was focused only upon the allegations and the evidence involving the Taft-Hartley violations.

Moreover, the district court cautioned the jury that "each offense and the evidence pertaining to it should be considered separately. Also the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other defendant."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 81-2660/81-2666

UNITED STATES OF AMERICA

VS.

BOFFA, SR., EUGENE, Appellant in Nos. 81-2660, 81-2663, LEMON, CHANDLER, Appellant in Nos. 81-2661 and 81-2666 BOFFA, SR., EUGENE, KALMAR, SR., LOUIS and BOFFA, SR., ROBERT, Appellants in No. 81-2662 KALMAR, SR., LOUIS, Appellant in No. 81-2664 BOFFA, SR., ROBERT, Appellant in No. 81-2665

(D.C. Criminal Nos. 80-00036-01/03/04/05)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE—DISTRICT OF DELAWARE

Present: SEITZ, *Chief Judge* and SLOVITER and BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the—District of Delaware and was argued by counsel on May 25, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court filed July 27, 1981; August 5, 1981 and August 25, 1981, respectively, be, and the same are hereby reversed insofar as it convicted Eugene Boffa, Sr. and Chandler Lemon of seven counts of mail fraud and the cause be and the same is hereby remanded to the said district court for a new trial on the proper portions of Counts V-XI of the indictment; reversed insofar as it convicted Robert Boffa, Sr. and Charles Lemon of conspiracy and substantive RICO charges and the cause be and the same is hereby remanded to the district court for a new trial on the proper portions of Counts I and II of the indictment; vacated insofar as the judgments of forfeiture entered after Robert Boffa, Sr. and Chandler Lemon's convictions for conspiracy and substantive RICO charges are concerned; vacated insofar as the judgments of forfeiture as it applies to Eugene Boffa, Sr. and Louis Kalmar, Jr. are concerned; vacated insofar as the sentence of Eugene Boffa, Sr. for conspiracy and substantive RICO charges are concerned and the district court is directed to resentence Boffa in light of this Court's invalidation of the mail fraud allegations. The Orders of the district court will be affirmed in all other respects, all in accordance with the opinion of this Court.

ATTEST:
By: /s/ Sally Mrvos
SALLY MRVOS
Clerk

August 25, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-2662
No. 81-2664

UNITED STATES OF AMERICA

v.

LOUIS S. KALMAR, SR.,

Appellant.

SUR PETITION FOR REHEARING

PRESENT: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz

SEITZ
Chief Judge

Dated: September 24, 1982

APPENDIX D

18 U.S.C.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity means . . . (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds) . . .

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18,

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§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the

collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons. (Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943).

APPENDIX E

29 U.S.C. § 186. Restrictions on financial transactions

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept,

any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

APPENDIX F

Federal Rule of Criminal Procedure 31(c)

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

APPENDIX G

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

IN THE SUPREME COURT
OF THE UNITED STATES

LOUIS S. KALMAR, SR.,	:	
	:	
Petitioner	:	
	:	
	:	UNITED STATES SUPREME
VS.	:	COURT NO. 82-878
	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent	:	

PETITIONER'S MOTION FOR
WAIVER OF TIME REQUIREMENT
OF SUPREME COURT RULE 20.1

LOUIS S. KALMAR, SR., petitioner in the above captioned case, hereby moves, pursuant to the authority of Schacht vs. United States, 398 U.S. 58 (1970) and other authorities cited herein, for an order waiving the time requirement of United States Supreme Court Rule 20.1 for petitions for certiorari to review judgments in a criminal case, and in support thereof states:

1. The Petition for Writ of Certiorari filed by petitioner was received at the guard station of the United States Supreme Court at 12:23 a.m. on November 24, 1982.

2. The Clerk of the United States Supreme Court has docketed the Petition for Certiorari as having been filed on November 24, 1982.

3. The last day for filing the Petition for Writ of Certiorari in this action, under Rule 20.1 of the Supreme Court was November 23, 1982 and, accordingly, the Petition for Certiorari was one day out of time and, specifically, delivered to the Supreme Court approximately 23 minutes late.

4. By this motion, petitioner seeks a waiver of Rule 20.1 and in support thereof assigns the following reasons and grounds:

a. Attached hereto as Exhibit "A" is the affidavit of counsel setting forth the reasons that the Petition was delivered 23 minutes late to the United States Supreme Court.

These reasons, in the summary, are that Pennsylvania Appellate Printing Company, Inc., the printer of the Petition, had arranged with BND Courier Systems to deliver the Petition on November 23, 1982. The Petition was to be hand delivered by a messenger. The messenger's truck broke down near the Baltimore Harbor Tunnel and delay ensued while the truck was repaired. The failure to deliver the Petition in time was due to this mechanical breakdown.

b. Likewise attached to Exhibit "A" is a copy of the "Proof of Service" of service of copies of the Petition for Writ of Certiorari upon, inter alia, the Solicitor General of the United States which reflects that copies of the Petition were mailed, first class mail, on November 23, 1982.

c. Had the Petition for Writ of Certiorari been likewise mailed to the United States Supreme Court on November 23, 1982, as were the service copies, the Petition would have been timely filed pursuant to Supreme Court Rule 28.2 which allows for timely filing as of the date of mailing.

d. Had the Petition been mailed on November 23, 1982 it would not have been received by the Clerk of the United States Supreme Court any earlier than November 24, 1982 and, in all liklihood not until November 26, 1982 since Thursday, November 25, 1982 was Thanksgiving Day, a legal holiday.

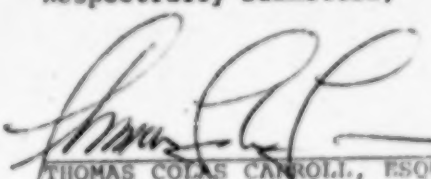
e. Petitioner seeks a waiver of the time limitations under the authority of Sanabria vs. United States, 437 U.S. 54, 62, FN. 12 (1978) and Schacht vs. United States, 398 U.S. 58 (1970), both of which hold that the United States Supreme Court may waive its own requirement that Petitions for Certiorari in criminal cases be filed within a specified number of days of judgment.

f. Petitioner believes, and therefore avers, that the affidavit attached hereto presents facts showing that petitioner has acted in good faith and that the delay in filing the Petition for Certiorari was brough about by circumstances largely

beyond his control and, in any event, the one day lateness in filing the Petition has caused no prejudice to any party.

WHEREFORE, petitioner, by his counsel, hereby moves for an Order waiving the time limitation of Supreme Court Rule 20.1.

Respectfully Submitted,



THOMAS COLAS CARROLL, ESQUIRE
Attorney for Petitioner

Dated: February 25, 1983

IN THE SUPREME COURT
OF THE UNITED STATES

LOUIS S. KALMAR, SR.,	:	
Petitioner	:	
VS.	:	UNITED STATES SUPREME COURT NO. 82-878
UNITED STATES OF AMERICA,	:	
Respondent	:	

AFFIDAVIT OF COUNSEL

COMMONWEALTH OF PENNSYLVANIA: SS
COUNTY OF PHILADELPHIA :

THOMAS COLAS CARROLL, ESQUIRE, being duly sworn according to law, deposes and says:

1. I am a member of the bar of the Supreme Court of the United States.

2. I represent the petitioner, Louis S. Kalmar.

3. I make the within Affidavit in support of the accompanying Petitioner's Motion for Waiver of Time Requirement of Supreme Court Rule 20.1.

4. A Petition for Rehearing in the United States Court of Appeals for the Third Circuit was denied on September 24, 1982, thereby making this Petition for Writ of Certiorari due for filing on or before November 23, 1982 under Rule 20 of the United States Supreme Court.

5. On November 19, 1982 I delivered to Pennsylvania Appellate Printing Company, 177 Ryan Street, South Plainfield, New Jersey 07080. The typewritten Petition for Certiorari to be typeset and delivered to the United States Supreme Court on November 22, 1982.

6. On Saturday, November 20, 1982 the printer typeset the Petition and galley proofs were delivered to me on Monday morning, November 22, 1982. I corrected typographical errors via

the telephone. The printer advised that the final printing of the Petition could not be accomplished until November 23, 1982 and the Petition would be timely filed on that date.

7. On November 23, 1982 I spoke with the printer at approximately 11:00 a.m. who advised that the Petition would be mailed to the United States Supreme Court at approximately 2:00 p.m. and would thereby be timely filed under Rule 28.2.

8. To my great regret, I told the printer that I was uncomfortable with mailing the Petition and would prefer to see it hand delivered. After further discussion with the printer, I acquiesced in the arrangement that it be mailed.

9. At approximately 3:00 p.m. on November 23, 1982, the printer called back and advised that since I had expressed displeasure at the Petition being mailed the printer had elected to use a courier to hand deliver the Petition and it would be delivered to the courier very shortly for hand delivery in Washington before midnight.

10. On November 24, 1982 the Clerk of the United States Supreme Court telephoned my office to advise that the Petition had been received and requested that I forward the $200.00 docketing fee which I did that afternoon. I assumed, without asking, that the Petition had been received on the 23rd.

11. On November 26, 1982 I spoke with Ms. McFarland of the Clerk's Office to obtain the docket number on the case. Ms. McFarland advised me that her records showed that the Petition had been left with the guard at the Supreme Court building at 12:23 a.m. on November 24 and that the filing date would be as of November 24. Ms. McFarland graciously delayed assigning a filing date to the Petition until I could determine what had happened.

12. As it developed, the Clerk's records were correct and the Petition was delivered some 23 minutes late due to the breakdown of the courier's truck which was subsequently confirmed to me by copy of a letter dated December 8, 1982 from the courier

which is attached to this Affidavit as Attachment "1".

13. Attached to this Affidavit as Attachment "2" is a copy of the "Proof of Service" showing that the service copies of the Petition were mailed by Appellate Printing Company on November 23, 1982.

14. Thus, if the printer and I had followed the original concept of mailing not only the service copies but the filing Petition as well, the Petition would have been deemed timely filed under Rule 28.2.

15. My client is completely faultless in this matter, having relied on me and the printer to ensure that the Petition was timely filed.

16. I believe that this case presents an appropriate matter for waiver of the filing time because although the Petition was not filed until November 24, 1982, the receipt date i.e. November 24, 1982 was actually earlier than the receipt date would have been had the Petition been mailed under Rule 28.2. In these circumstances, I submit that favorable reconsideration should be given to our request for waiver.

Respectfully Submitted,

THOMAS COLAS CARROLL, ESQUIRE
Attorney for Petitioner

SWORN TO AND SUBSCRIBED TO
BEFORE ME THIS 25th DAY
OF February, 1983.

NOTARY PUBLIC

IN THE SUPREME COURT
OF THE UNITED STATES

LOUIS S. KALMAR, SR.,	:	
	:	
Petitioner	:	
	:	UNITED STATES SUPREME
VS.	:	COURT NO. 82-878
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent	:	

PROOF OF SERVICE

Undersigned counsel, a member of the bar of the United States Supreme Court, hereby certifies that on the 25th day of February, 1983 I caused service, by United States Mail, first class, postage pre-paid, of a copy of Petitioner's Motion for Waiver of Time Requirement of Supreme Court Rule 20.1 upon the Solicitor General of the United States, United States Department of Justice, Washington, D.C.

THOMAS COLAS CARROLL, ESQUIRE
Attorney for Petitioner

Exhibit "A"

LEGAL · FINANCIAL · INSTITUTIONAL & CORPORATE PRINTERS

Appellate Printing Co., Inc.

February 3, 1983

Thomas Carroll, Esq.
One Independence Mall
615 Chestnut St., Suite 1206
Phila., PA 19106

RE: Kalmar vs US

Dear Mr. Carroll:

Enclosed is a copy of a letter from B & D Courier Systems giving details of why they made delivery late and also a copy of the Proof of Service.

I am sorry that you haven't received this information as yet. I was under the impression that this matter had been taken care of.

If we can be of any further help, please contact us.

Very truly yours,

APPELLATE PRINTING CO., INC.

Joan Balon

Joan Balon,
Credit Manager

enc.

Attachment "1(a)"

1 WORLD TRADE CENTER • SUITE 7967
NEW YORK, NY 10048
(212) 480-9180

1 PLAZA PLACE NE
ST. PETERSBURG, FL 33701
(813) 823-1258

177 RYAN STREET
SOUTH PLAINFIELD, NJ 07080
(201) 753-0200

1518 WALNUT STREET
PHILADELPHIA, PA 19102
(215) 545-1707

BND courier systems
EASTERN

BND Courier Systems
373 Fifth Avenue
New York, NY 10016
212-962-2350
800-223-1282
Washington:
202-638-3470

Air Courier
Motor Courier
Foot Courier
Time Service

Symbol for BND's
City to City
Package Shuttle Service

December 8, 1982

Appellate Printing
177 Ryan Street
S. Plainfield, N.J.

Att: Mr. Andy Ferguson

Dear Andy,

On November 23, 1982 I made a pick-up from Appellate Printing in S. Plainfield, N.J. going to the Supreme Court in Washington D.C.. The Pick-up was made at Approxamely 6:55pm. The traffic at the Baltimore Harbor tunnel was at a virtual standstill due to an accident and my vechile overheated and popped a hose. I had to find a repair station and wait while they attached a new hose to my car. As a result, I arrived in Washington D.C at 12:22 am.

Darryl Holmes

Darryl Holmes

Attachment "1(b)"

Best Copy Available

Job #830731

Thomas C. Carroll, Esq.
CARROLL & CARROLL, ESQS.
615 Chestnut Street
Independence Mall, Suite 1206
Philadelphia, PA 19106
(215) 925-4100

PROOF OF SERVICE FORM
New Jersey Appellate Printing Co.
177 Ryan Street
South Plainfield, N. J. 07080
(201) 753-0200

IN THE

Supreme Court of the United States

DOCKET NO.

Kulmir

vs.

United States of America

STATE OF NEW JERSEY)
: ss.
COUNTY OF MIDDLESEX)

PROOF OF SERVICE

I, RONALD D. ANZIVINO, of full age, being duly sworn according to law upon my oath, depose and say:

1. I am the President of New Jersey Appellate Printing Co., Inc., a New Jersey corporation, the principal place of business of which is located at 177 Ryan Street, South Plainfield, New Jersey.

2. On the 23rd day of November 1982, at [illegible] South Plainfield, New Jersey, a package containing 40 copies Petition for Certiorari to:

SUPREME COURT OF THE UNITED STATES
1 First Street, N.E.
Washington, D.C. 20534

3 copies Petition for Writ of Certiorari

DELIVERED by HAND

first class mail, addressed:

Solicitor General
Rm. 5143
Dept. of Justice, Rm. 5614
Washington, D.C. 20530

Seymour Margulies, Esq.
921 Bergen Avenue
Jersey City, N.J. 07306

Frank J. Marine, Esq.
Criminal Division
App Unit, Room
U.S. Dept. of Justice
P.O. Box [illegible] Franklin Station
Washington, D.C. 20530

Sworn and subscribed to
before me this day
of 1982

MARY ANN JONES
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Oct. 8, 1987

Ronald D. Anzivino
RONALD D. ANZIVINO

Attachment "2"

Office-Supreme Court, U.S.
FILED
MAR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS S. KALMAR, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Reply Brief of Petitioner to Brief of the United States in Opposition to Petition for a Writ of Certiorari

THOMAS COLAS CARROLL,
Counsel of Record
CARROLL & CARROLL,
Attorneys for Petitioner, Louis S. Kalmar, Sr.

Suite 1206,
615 Chestnut Street,
Philadelphia, Pennsylvania 19106
(215) 925-4100

Appellate Printing Co., Inc., (215) 545-1707

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REPLY POINT I:

The Government's response urging denial of Certiorari on Petitioner's Point that the Court of Appeals affirmed on a theory not submitted to the Jury should be rejected because:

The Solicitor General's disagreement with the approach of the Court of Appeals, coupled with the solicitor's unmeritorious view that the differences between the trial theory and appellate affirmance is purely semantic and non-prejudicial, further favors the grant of Certiorari. 1

REPLY POINT II:

The Government's contention that Certiorari should be denied with respect to Petitioner's Point that he was entitled to a lesser included offense instruction on predicate offenses in this RICO prosecution should be rejected because:

The Government's position that because predicate offenses do not merge for purposes of sentencing with the RICO charge that they therefore do not constitute lesser included offenses under Rule 31(c) of the Federal Rules of Criminal Procedure, is a non-sequitur after *Missouri v. Hunter*. 3

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REPLY POINT III:

The Court should waive the time limitation of Supreme Court Rule 20.1 where the Petition for Certiorari was filed one day late due to the mishap explained in Petitioner's Motion for Waiver of time requirement of Supreme Court Rule 20.1. 7

TABLE OF AUTHORITIES

CASES CITED:

Beck v. Alabama,
446 U.S. 625 (1980) 6

Blockburger v. United States,
284 U.S. 299 (1932) 3, 4

Boffa v. United States,
No. 82-814 7

Chiarella v. United States,
445 U.S. 222 (1980) 3

Dunn v. United States,
442 U.S. 100 (1979) 3

Keeble v. United States,
412 U.S. 205 (1973) 6

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Schacht v. United States,
398 U.S. 58 (1970) 7

Sanabria v. United States,
437 U.S. 54 (1978) 7

TABLE OF AUTHORITIES

CASES CITED:

Sansone v. United States,
380 U.S. 299 (1964) 3, 4

United States v. Boylan,
620 F.2d 359 (2d Cir. 1980) 4

United States v. Harley,
678 F.2d 961 (11th Cir. 1982)
(U.S. Appeal pending) 4

United States v. Hawkins,
658 F.2d 279 (5th Cir. 1981) 4

United States v. Scotto,
641 F.2d 47 (2d Cir. 1980) 4

Whalen v. United States,
445 U.S. 684 (1980) 5

RULES CITED:

Rule 20.1 7

Rule 31(c) 3

Reply Point I

The Solicitor General's disagreement with the approach of the Court of Appeals, coupled with the solicitor's unmeritorious view that the differences between the trial theory and appellate affirmance theory is purely semantic and non-prejudicial, further favors the grant of *certiorari*.

The change of theory between trial and appeal in this case has worked to Petitioner's detriment not only in the Court of Appeals but on this Petition as well since it must reasonably appear to this Court that the parties cannot decide what the issues are, contributing to the Solicitor's suggestion that the issue is "highly fact-bound" and urging denial of *certiorari*. The issue in the District Court was reasonably clear cut, i.e., the Government contended, and the District Court charged, the four payments (between two corporations controlled by Petitioners) pyramided the use of the car into four units of prosecution because each payment served to discharge the union official's debt for a given month of use; Petitioner had contended that the discharge of debt rationale was not viable on the facts and while the gift of the car was a crime, it was not divisible into four crimes by reference to the payments. On appeal, the payments were re-characterized, on the Court of Appeals' perception of what the Government's contention was, and the single offense again was divided into four crimes but on a different theory.

The Solicitor declines to defend the Government's trial theory. The Solicitor likewise does not contend that the Court of Appeals correctly stated that Government's position with respect to the payments. Indeed, the Solicitor expressly disagrees with the approach of the Court of Appeals (Fn. 19 of Brief in Opposition). The Solicitor opts for the view that the divisibility of the offense was not dependent upon the relationship between use of car

and payments espoused by the Government at trial and found significant on appeal, albeit under a changed theory. The Solicitor states:

> "In the present case, the evidence clearly showed that Petitioner Kalmar caused four indirect payments to be made to Sheeran. He caused UCI to make monthly payments to APL, a separate corporation, and APL provided the use of the car to Sheeran . . . No other facts had to be proved to established multiple violations of 29 U.S.C. §186(a)." (Brief in Opposition, pp. 20-21).

This view leads the Solicitor to contend that any difference between the trial and appellate affirmance theories is purely semantic (at p. 19).*

Under the Solicitor's view, the relationship between the payments and the official's use of the car was not required to be submitted to the jury either under a discharge of debt theory or acquisition of interest theory or, apparently, under any other theory. Instead, the four payments coupled with the official's use of the car automatically created four offenses. The Solicitor's view converts the issue into a pure question of law; whereas, the District Court and the Court of Appeals treated it as a matter of fact for the jury, the lower court and appellate court differing on what the operative facts were leading to Petitioner's complaint that the appellate affirmance theory was not submitted to the jury.

---

* The Solicitor's view, in this Court, does considerable violence to the statutory units of prosecution in 29 U.S.C. 186(a), as alleged in the indictment and charged on by the District Court ("deliver . . . thing of value . . . to any officer . . . of a labor organization . . ."), ignoring as it does the necessary linkage between payments within the employer group (not per se violative of the Act) and delivery of the thing of value to the official (violative of the Act) where the former is multiple but the latter unitary and where the inquiry is units of prosecution in a "pattern" RICO case.

The Solicitor's disagreement with the approach of the Court of Appeals, and the Solicitor's unwillingness to defend the Government's trial position, must fairly be viewed as further evidence that the Court of Appeals did indeed change the theory of the case. The Solicitor is not heard in the Brief in Opposition to vouch for the Court of Appeals' rationale that the operative facts were submitted for jury resolution.

It is too late, post-appellate affirmance, it is submitted, for the Solicitor to suggest that the question is purely one of law. The difference in trial and appellate theories is not semantic, but manifestly different in operative facts, and the appellate affirmance theory was never submitted to the jury warranting a grant of *certiorari* under the authority of *Dunn v. United States*, 442 U.S. 100 (1979) and *Chiarella v. United States*, 445 U.S. 222 (1980).

Reply Point II

The Government's position that because predicate offenses do not merge for purposes of sentencing with the Rico charge that they therefore do not constitute lesser included offenses under Rule 31(c) of the Federal Rules of Criminal Procedure, is a non-sequitur after *Missouri v. Hunter*.

That Congress intended cumulative punishment of RICO and its predicates does not answer the question of whether the predicate offenses are "separate offenses" under the standards of *Blockburger v. United States*, 284 U.S. 299 (1932) and, more pertinently, whether they are lesser included offenses under *Sansone v. United States*, 380 U.S. 299 (1964), for purposes of a lesser included offense instruction under Federal Rule of Criminal Procedure 31(c). While the Courts are in unison that cumulative punishment is permitted, there are varying ap-

proaches on the rationale for cumulative sentencing which, petitioner submits, beckon in different directions where the inquiry is a defendant's entitlement to a lesser included offense instruction and favors the grant of certiorari.

The Second Circuit in *United States v. Boylan*, 620 F.2d 359, 360-61 (2d Cir. 1980) and *United States v. Scotto*, 641 F.2d 47, 56 (2d Cir. 1980) has held that RICO and its predicates are "separate crimes, separately punishable" because they "do not proscribe the same act or transaction, and they implement different congressional purposes". Under the Second Circuit approach, cumulative sentencing for RICO and its predicates appears to be allowed for two reasons: (1) the predicate-RICO relationship is such that under *Blockburger v. United States*, 284 U.S. 299 (1932) the offenses are not the "same"; (2) there is a clear congressional intention to allow cumulative sentencing. Other circuits, while in accord that congressional purpose allows cumulative sentencing, have not been as certain that the RICO-predicate relationship does not make them the "same" under the *Blockburger* test. For example, in *United States v. Harley*, 678 F.2d 961, 991-992 (11th Cir. 1982) (U.S. Appeal Pending), the Court observed that at first blush it would appear that the predicate offenses and RICO run afoul of the *Blockburger* test. Likewise, the former Fifth Circuit in *United States v. Hawkins*, 658 F.2d 279, 288 (5th Cir. 1981) has expressly declined to decide the question of whether RICO and its predicates fit within the *Blockburger* test, relying instead on congressional intention to authorize cumulative punishments. The Third Circuit, in the instant case, observed that RICO and its predicates meet the "facial requirements" of the *Blockburger* related test in *Sansone v. United States*, 380 U.S. 299 (1964).

Mr. Justice Rehnquist, dissenting in *Whalen v. United States*, 445 U.S. 684, 708-709 (1980) has pointed out that it appears to be clear that a legislature could provide for separate punishments under two statutory provisions, even though the provisions are the "same offense" within the meaning of *Blockburger*. The example offered by Mr. Justice Rehnquist was as follows:

> "To take a simple example, a legislature might set the penalty for assault at two years imprisonment while setting the penalty for assault with a deadly weapon as "two years for assault and an additional two years for assault with a deadly weapon'. Even though the former crime is obviously a lesser included offense of the latter crime—or, in the rubric of *Blockburger*, the first offense does not require proof of any fact of the second does not—neither *Blockburger* nor the Double Jeopardy Clause would preclude the imposition of the 'cumulative' sentence of two years." (445 U.S. at 708)

In *Missouri v. Hunter*, ___ U.S. ___, No. 81-1214 (1983) this Court has explicitly held that cumulative punishments, when specifically intended by the legislature, may be imposed even though the offenses are the "same" under *Blockburger*. The Government's argument that because RICO and its predicates may be cumulatively punished, they therefore do not constitute lesser included offenses, is based on a non-sequitur.

Petitioner submits that because RICO-predicates is a compound, predicate offense, and not a traditional greater-lesser offense, does not foreclose the availability of a F.R. Crim. P. 31(c) lesser offense instruction, although Petitioner notes the Court has not decided this point. (Compare Mr. Justice Stewart's opinion in *Whalen* at 445 U.S. 964-965 with Mr. Justice Rehnquist's dissent at 445 U.S. 708).

In the present case, the Court of Appeals held that a "lesser included offense instruction would be inconsistent with Congress's intention to permit multiple convictions and consecutive punishment for RICO and predicate crimes" (App. 39a), implying that the instruction would dilute RICO's intended severity. RICO is to be sure a prosecutor's weapon in the war on crime but the lesser offense instruction, itself, is a hessian, owing fealty only to *Sansone*, and is an available conscript for either prosecution or defense. Where the Government's proof fails on the added elements of RICO but suffices on the predicates (and the predicates have not been separately charged—a decision within the exclusive power of the prosecutor), the instruction would be a welcome ally to the prosecutor fulfilling, not diluting, the perceived congressional severity.

Viewed as a potential defense conscript, in *Keeble v. United States*, 412 U.S. 205 (1973) and more recently in *Beck v. Alabama*, 446 U.S. 625 (1980), this Court has noted that the lesser included offense instruction doctrine has some constitutional underpinnings. An instruction affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. Mr. Justice Brennan in *Keeble* referred to it as a "third option" of convicting on a lesser included offense which serves to insure that the jury will accord the defendant the full benefit of the reasonable doubt standard. Indeed, in *Keeble*, the defendant was held entitled to a lesser included offense instruction even though the lesser offense itself was not one of the crimes enumerated in the Major Crimes Act and the lower court lacked jurisdiction with respect to the lesser offense.

RICO and its predicates meet the *Sansone* test. The congressional intention to permit cumulative punishment should not be mistaken as a prohibition on lesser

offense instructions in RICO prosecutions. Petitioner urges the Court to grant *certiorari* to resolve this important question.

Reply Point III

The Court should waive the time limitation of Supreme Court Rule 20.1 where the Petition for Certiorari was filed one day late due to the mishap explained in Petitioner's motion for waiver of time requirement of Supreme Court Rule 20.1.

The due date for the Petition for Certiorari was November 23, 1982. The Petition was delivered to the Supreme Court at 12:23 a.m. on November 24, 1982. Petitioner's Motion for Waiver, heretofore filed with the Clerk, with accompanying Affidavit of Counsel and supporting documentation, sets forth the details of a breakdown in the courier's vehicle enroute to Washington, D.C. on November 23, 1982.

Under the authority of *Sanabria v. United States*, 437 U.S. 54, 62, fn. 12 (1978) and *Schacht v. United States*, 398 U.S. 58 (1970), Petitioner seeks a waiver by the Court of Rule 20.1 time requirements.

Petitioner further submits that this Petition incorporates the timely filed petition in *Boffa v. United States*, No. 82-814, and the Government has filed a consolidated Brief of the United States in Opposition to both Petitions. No prejudice has accrued as a result of the one day late filing.

Respectfully submitted,

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Attorney for Petitioner